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FROM THE ICIJ Blog

Wealthy nations preserve bribery loophole

Anti-bribery experts were mostly upbeat when they met last month in Paris at the Organization of Economic Cooperation and Development (OECD) to celebrate 15 years of anti-corruption efforts. But the assembled experts agreed that work remains to be done. One of the most surprising challenge that the corruption fighters still confront: the resistance of a handful of wealthy nations, including the United States, Australia and South Korea, to abolishing one of the last legal exceptions to bribery bans.

Facilitation payments – also known as “grease payments” – are small fees paid to low-level public officials for basic administrative tasks to which the payer is entitled. The money must be recorded by the company that makes them. While not prohibited under the OECD anti-bribery convention, the OECD **encourages** governments to “prohibit or discourage” such payments, **calling** them “corrosive” to economic development and the rule of law.

Heeding this encouragement, more and more countries have joined the concert of nations that prohibit facilitation payments. Under the Bribery Act 2010, the UK’s Serious Fraud Office may **criminally prosecute** individuals and companies that use facilitation payments. In March 2013, Canada became the latest high-profile nation to declare war on grease payments, passing the Corruption of Foreign Public Officials Act. Out of 33 countries evaluated by the OECD, 25 report having no exemption for facilitation payments in their anti-bribery laws.

Defenders of the exception argue that facilitation payments are a harmless necessity in countries where public officials earn meager salaries. The routine payments can be so small as to not be worth the attention and resources of national corruption watchdogs.

“The reality is most bribery payments are not made where the payment is conceived of in a corporate boardroom,” said Mike Koehler, Assistant Professor Law at Southern Illinois University who founded and edits the blog **FCPA Professor**.

Several wealthy nations continue to allow the practice.

The USA permits facilitation payments the under Foreign Corrupt Practices Act, despite recent cases brought by the Securities and Exchange Commission (SEC) that found illegal bribes had been wrongly recorded as facilitation payments. In 2012, the SEC **censured** the Saudi subsidiary of an American pharmaceutical company for paying a customs official to release products from a port without permission.

In Australia, a 2011 government-led public discussion on removing the exception has since lapsed silently – surprising some.

“The whole tone of the consultation was that the Government was working to remove the exception,” said Mark Zirnsak, Director of the Justice and International Mission for the United Church’s Synod of Victoria and Tasmania.

A number of small and large Australian businesses active in Asia, the Pacific and Africa made submissions opposing the change.

“Facilitation payments’ are necessary for QBE to operate in countries where governments simply do not have the resources to provide required routine government services and actions,” submitted global insurance giant QBE.

Other companies, including large multinationals, have voluntarily prohibited facilitation payments.

In October, New Zealand, which has not prosecuted any foreign bribery cases since 2001, was **taken to task** for “vague and ambiguous statutory language” that did little to discourage facilitation payments. South Korea, another country with low corporate prosecutions of foreign bribery, **defends** its use of the facilitation payment exception as “very narrow, and there is no confusion regarding its application”.

Rachel Nicolson, Partner at Australian law firm Allens Linklaters and Director of the business-endorsed United National Global Compact Network board in Australia, said that the countries maintaining the facilitation payment exception are increasingly “out of step”.



Opponents argue the exception confuses the distinction between legal and illegal payments and risks sending a message that it is “ok” to pay small bribes.

“The reason it [the exception] exists is because for many years there was an understanding it was very difficult to get things done,” said Nicolson, “and a belief that those small payments would not be problematic.”

But that has changed and “there is an increasing risk attached to making those payments overseas,” said Nicolson.



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